



Signed and Filed: April 12, 2011

Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re) Bankruptcy Case
MARY ANNE C. BARON AND ALLEX D.) No. 10-33751DM
BARON,) Chapter 13
Debtors.)

MEMORANDUM DECISION RE ATTORNEYS FEES CLAIMED IN FOOTNOTE

On November 10, 2010, Wells Fargo Bank, NA ("Wells Fargo"), though its counsel, filed a proof of claim indicating that Debtors owed \$0.00 in arrearages, and \$611,236.58 in secured debt. Even though Debtors were current on their obligations, Wells Fargo indicated in a footnote on an attachment to the proof of claim that it had incurred \$300 in attorneys fees:

Please be on notice that \$300.00 in attorneys' fees and costs have been incurred for the post-petition preparation and filing of this Proof of Claim; obtaining and reviewing the Chapter 13 Plan; and the preparation, filing and service of a Request for Courtesy Notice to monitor this bankruptcy, but are not included in the Proof of Claim. If the Debtor(s) want these fees and costs included in the Proof of Claim so that the subject loan is current upon completion of the Plan, please contact [counsel for Wells Fargo].

Emphasis added.

Although this footnote indicates that the \$300 was not included in the total amount due, Wells Fargo stated in subsequent

1 pleadings that it "properly included attorneys' fees and costs in
2 its Proof of Claim." As discussed below, based on the relevant
3 language of the underlying deed of trust, the court believes that
4 Wells Fargo did not provide sufficient notice of the fees to
5 Debtors. Therefore, whether or not the \$300 charge was included
6 in the total amount due or in the proof of claim, the court will
7 disallow it.

8 In their objection to Wells Fargo's proof of claim, Debtors
9 argued that Wells Fargo was undersecured and thus could not assert
10 a claim for postpetition attorneys fees under 11 U.S.C. § 506(b).
11 Debtors further contended that the \$300 fee was not reasonable
12 given that Debtors did not owe any arrearages, and that the
13 footnote in the proof of claim provided insufficient notice of
14 Wells Fargo's intent to charge such a fee. Debtors requested the
15 court to disallow Wells Fargo's secured claim in its entirety in
16 light of the alleged impropriety of asserting that it had incurred
17 the \$300 fee, and prayed that the court award them \$750.00 for
18 legal fees and expenses incurred in objecting to the claim.

19 In response, Wells Fargo correctly cited governing Ninth
20 Circuit authority that an unsecured or undersecured creditor may
21 file a claim for fees incurred postpetition if such fees are
22 otherwise allowable under law. In re SNTL Corp., 571 F.3d 826,
23 843 (9th Cir. 2009). That said, Wells Fargo cannot use the notice
24 purportedly provided by the footnote in the proof of claim as
25 grounds for collecting or charging the fee to Debtors.

26 Under California law, provisions of a contract permitting a
27 party to recover reasonable attorneys' fees incurred in enforcing
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1 that contract are enforceable. Cal. Civ. Code § 1717(a).¹ Wells
2 Fargo asserted that it was entitled to assert the claim for
3 attorneys fees pursuant to section 7 of the deed of trust, which
4 provides:

5 If (a) I do not keep my promises and agreements made in
6 this Security Instrument, or (b) someone, including me,
7 begins a legal proceeding that may significantly affect
8 Lender's rights in the Property (including but not
9 limited to any manner of legal proceeding in bankruptcy,
10 in probate, for condemnation or to enforce laws or
11 regulations), then the Lender may do an pay for whatever
12 it deems reasonable or appropriate to protect the
13 Lender's rights in the Property. Lender's actions may
14 include, without limitation, appearing in court, paying
15 reasonable attorneys' fees, purchasing insurance
16 required under Paragraph 5, above (such insurance may
17 cost more an provide less coverage than the insurance I
18 might purchase), and entering on the Property to make
19 repairs. Lender must give me notice before Lender may
20 take any of these actions. Although Lender may take
21 action under this Paragraph 7, Lender does not have to
22 do so. Any action taken by Lender under this Paragraph
23 7, will not release me from my obligations under this
24 Security Instrument.

25 I will pay to Lender any amounts which Lender advances
26 under this Paragraph 7 with interest, at the interest
27 rate in effect under the Secured Notes. I will pay those
28 amounts to Lender when Lender sends me a notice
requesting that I do so.

Emphasis added.

At a hearing on the claim objection, Debtor's counsel argued
that Wells Fargo had not provided the notice of the attorneys fees
required by section 7 of the governing deed of trust.² The court

¹However, if such a clause exists, the other party may
recover reasonable attorneys fees if it prevails "on the
contract." Cal. Civ. Code § 1717(a). The party prevailing on the
contract "shall be the party who recovered a greater relief on the
contract." Cal. Civ. Code § 1717(b).

²At the hearing, the court instructed Wells Fargo to provide
further authority for its position no later than March 11. Wells
Fargo did not file a timely supplemental memorandum. Debtors

1 agrees. As stated previously, Wells Fargo can recover reasonable
2 attorneys fees under California law to the extent it is entitled
3 to them contractually. Here, under the terms of the contracts
4 drafted or provided by the lender from whom Wells Fargo acquired
5 its rights, Wells Fargo is not entitled to recover the fees.³
6 Section 7 requires the lender to "send" notice to Debtors before
7 paying attorneys fees; simply filing a proof of claim does not
8 constitute "sending" notice, as no proof of service has been filed
9 indicating that the claim was sent to Debtors, and proofs of claim
10 are not electronically noticed by the court. The promissory note
11 at paragraph 9 states that notices shall be given to Debtors by
12 first class mail.⁴ Adding a footnote to an attachment to a proof
13 of claim does not provide the notice contemplated by the pertinent
14 agreements, which were not drafted by Debtors.

15 Consequently, to the extent the Wells Fargo's claim includes
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17 therefore requested an order by default disallowing the claim and
18 awarding them attorneys' fees. Wells Fargo responded that its
19 "failure to file the above statement resulted from both [sic] a
20 scheduling error by [its] counsel regarding the deadline to
21 respond to the Court's order[,] but did not submit declarations
22 to support this statement. After Debtors filed another response,
23 the court directed the parties not to file anything further.

24 ³Wells Fargo argues that it was not required to provide
25 notice because it had not paid the fees, only incurred liability
26 for them. Wells Fargo has not provided a declaration or evidence
27 in support of that assertion.

28 ⁴The promissory note also provides in section 8 ("Borrower's
Failure to Pay as Required") that "the Lender will have the right
to be paid back by me for all costs and expenses in enforcing this
Note to the extent not prohibited by applicable law. Those
expenses may include, for example, reasonable attorneys' fees and
court costs." As Debtors were not in default under the Note,
Wells Fargo was not taking an action to enforce it. Even if it
had, the terms of the Deed of Trust require notice of such fees to
be sent to Debtors.

1 the attorneys' fees, that amount (\$300) should be disallowed.
2 However, Debtors have not provided grounds for disallowance of the
3 full claim (particularly when the claim indicates that the \$300
4 fee is not included in the total amount due).

5 Even though the court believes that Debtors' actual aim in
6 filing the objection was to have the \$300 fee stricken and to
7 prevent Wells Fargo from asserting a default based on nonpayment
8 of that amount, the court is not granting all of the relief they
9 sought (i.e., disallowance of the claim in its entirety). If
10 Debtors want to recover their attorneys' fees under the
11 reciprocity provision of section 1717(a) of the California Civil
12 Code, they will need to file a motion for determination that they
13 are the prevailing parties. See Cal. Civ. Code § 1717(b)(1). The
14 court is denying Debtors' request for attorneys fees under 28
15 U.S.C. § 1927, as no basis exists for a finding that Wells Fargo
16 multiplied the proceedings unreasonably and vexatiously.

17 The court will enter an order consistent with this Memorandum
18 Decision.

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20 **END OF MEMORANDUM DECISION**
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